

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

ROBERT HARRISON,	:	
Plaintiff	:	
	:	
v.	:	Docket No. 1:01-cv-64
	:	
DOC DENTAL CARE	:	
and JANET LEWIS, R.N.,	:	
Defendants	:	
_____	:	

RULING ON DEFENDANTS' MOTION TO DISMISS  
(Paper 26)

Defendants move for dismissal under Fed. R. Civ. P. 41(b) for failure to prosecute and to comply with the Court's Order of December 11, 2001. For the reasons discussed below, the motion to dismiss is GRANTED.

BACKGROUND

Pro se Plaintiff Robert Harrison ("Plaintiff") commenced this action on March 8, 2001 under 42 U.S.C. § 1983, alleging he was wrongfully denied dental care while incarcerated at Southeast State Correctional Facility in Vermont.

The Vermont Department of Corrections ("DOC"), an original Defendant, filed a motion to dismiss which was granted as to DOC only on December 11, 2001. (See Paper 18) The remaining Defendants filed a motion to compel answers to certain discovery requests. In the Court's December 11, 2001

Order, Plaintiff was instructed to respond to the discovery requests by January 10, 2002, and the Court expressly warned that "failure to respond by that date will result in dismissal of the lawsuit for failure to prosecute the claim." (See id. at 2)

Now, more than two years later, still no discovery materials have been provided. Consequently, Defendants request dismissal for failure to prosecute and to comply with a Court order. (See Paper 26) The time for responding to Defendants' motion has expired with no opposition from Plaintiff, and he has failed to otherwise contact the Court. Attempts to contact Plaintiff have proved unsuccessful, and several items mailed to his last known address have been returned undelivered to the Clerk's Office.

#### DISCUSSION

\_\_\_\_\_Rule 41(b) provides, in relevant part, "for failure of the plaintiff to prosecute or to comply with . . . any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." Fed. R. Civ. P. 41(b). Under Rule 41(b), a plaintiff has an obligation to diligently prosecute his case. See Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982); see also, Lucien v. Breweur, 9 F.3d 26, 29 (7th Cir. 1993). Thus, "completely aside from his

failure to comply with the order, a dismissal is justified for [plaintiff's] failure to prosecute at all." Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 667 (2d Cir. 1980). "A plaintiff's lack of diligence alone is enough for dismissal." West v. City of New York, 130 F.R.D. 522, 526 (S.D.N.Y. 1990).

The Second Circuit, however, has cautioned that dismissal under Rule 41(b) "is a harsh remedy and is only appropriate in extreme situations." Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996). It has further advised district courts to "be especially hesitant to dismiss for procedural deficiencies where . . . the failure is by a pro se litigant." Id.

Accordingly, the Second Circuit has detailed the following factors a court should consider before dismissing a case for failure to prosecute or to comply with a court order:

(1) the duration of the plaintiff's failure to comply with the court order; (2) whether plaintiff was on notice that failure to comply would result in dismissal; (3) whether the defendants are likely to be prejudiced by further delay in the proceedings; (4) a balancing of the Court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard; and (5) whether the judge has adequately considered a sanction less drastic than dismissal.

LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 209 (2d Cir. 2001) (citing Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988)).

The failure to comply with the Court's Order of December 11, 2001, despite the Court's express warning that dismissal

would result, militates in favor of dismissal under Rule 41(b). See, e.g., Chira, 634 F.2d at 668 (noting that although dismissal under Rule 41 is a "pungent" remedy, even a six-month delay by a plaintiff may warrant such a measure). Furthermore, in light of Plaintiff's delay, prejudice to Defendants may be presumed. Shannon v. Gen. Elec. Co., 186 F.3d 186, 193-94 (2d Cir. 1999) (holding that prejudice may be presumed "because delay by one party increases the likelihood that evidence in support of the other party's position will be lost and that discovery and trial will be made more difficult"). Having determined that no lesser sanction would suffice here, the Court concludes dismissal under Rule 41(b) is most appropriate.

#### CONCLUSION

Defendants' Motion to Dismiss is GRANTED. This case is DISMISSED with prejudice.

SO ORDERED.

Dated at Brattleboro, Vermont this \_\_\_ day of March, 2004.

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J. Garvan Murtha, U.S. District Judge